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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

LEONARD SIMMONS FENTRESS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Leonard Simmons Fentress, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on February 6, 1969.

CITATION TO OPINION BELOW

This petition seeks review of a decision of the Court of Appeals which affirmed petitioner's conviction in the United States District Court for the District of Maryland at Baltimore, Maryland wherein petitioner was charged under

a five (5) count indictment charging Conspiracy to Counterfeit United States Currency, Title 18 U.S.C. § 371; Making and Counterfeiting United States Currency, Title 18 U.S.C. § 471; Possessing and Concealing Counterfeit Currency, Title 18 U.S.C. § 472; Selling and Transferring and Delivering Counterfeit Obligation, Title 18 U.S.C. § 473; Possession of Photographic Negatives, Title 18 U.S.C. § 474. The Court of Appeals affirmed the conviction by judgment, without opinion, on February 6, 1969.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1969. A timely petition for rehearing was denied by the Court on March 4, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an affidavit in support of a search warrant which fails to set forth the source of the information concerning facts stated in the affidavit and the portion of the affidavit reciting personal observation was obtained by entry onto premises by pretext, and the articles observed were not sufficiently identified as the same articles referred to in the earlier portions of the affidavit was insufficient to support the issuance of a search warrant under the Fourth Amendment to the Constitution.

2. Whether the provisions of the Fourth Amendment can be legally circumvented, where during the course of the trial of a case, the Government does not attempt to introduce into evidence articles seized during the course of the execution of a search warrant, which petitioner contends was insufficient, but adduces testimony from witnesses that said articles were on the premises searched thereby making derivative use of the seized articles.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner, Leonard Simmons Fentress, was tried by jury in the United States District Court for the District of Maryland at Baltimore, Maryland on an indictment in five counts charging violations of the laws pertaining to Counterfeiting (Title 18, United States Code, Sections 371, 471, 472, 473 and 474). He was convicted as indicted, duly sentenced and his appeal was affirmed, without opinion, by the United States Court of Appeals for the Fourth Circuit.

On June 3, 1966, under the direction of Kenneth Thompson, Special Agent of the United States Secret Service, two Deputy Sheriffs of Prince Georges County, Maryland, came to petitioner's place of business known as the Municipal Auto Sales, Inc., 6307 Marlboro Pike, District Heights, Maryland under the guise of looking for a fugitive, William Smith, alias "Smitty." Their express instructions were to look for a press. The two Deputies were permitted to, and in fact did, search the premises. Later they reported back to Agent Thompson that they had seen a "little office duplicator or a mimeograph machine," while conducting the search for "Smitty." (Motion Transcript. 71-87).

Agent Thompson returned to the Municipal Auto Sales with the two Deputies to have a look for himself. The impression to be given was that Thompson was also a Deputy Sheriff, but was not identified as such, nor was he identified as a Secret Service Agent. While on the premises,

Thompson stuck his head around a partially open office door and saw a press behind it. He stepped into the office, lifted up a cover and saw the press.

Later that same afternoon, Agent Thompson returned with a search warrant and seized an A. B. Dick Model 350 offset press and various printing articles, including ink. (Motion Tr. 50-71).

The affidavit, in support of the search warrant (Appendix C), alleged that on April 6, 1966, one Joseph James McGirr, ordered an A. B. Dick Model 350 offset press, Serial No. 12010 from a firm in Arlington, Virginia and took delivery of the press on April 18, 1966. The affidavit further related how on June 2, 1966, McGirr informed and delivered to a Secret Service Agent one thousand counterfeit twenty dollar federal reserve notes in Baltimore, Maryland.

The affidavit went on to assert that "investigation" disclosed that McGirr frequented the Municipal Auto Sales (which were petitioner's business premises).

The affidavit concluded with the assertion that approximately 3:00 P.M. on June 3, 1966, the affiant, on a pretext, went to the premises of Municipal Auto Sales and observed through an open door an A. B. Dick Model 350 Offset Printing Press and some green printing ink. The affidavit was sworn to by Kenneth B. Thompson, Special Agent, United States Secret Service.

During the course of the trial, the Government did not introduce into evidence the articles seized at the time of the execution of the search warrant, referred to above. Nor was there any testimony concerning the search and seizure. A pre-trial motion to suppress the evidence, attacking the search warrant, had been denied by the Court.

Following an investigation into a counterfeiting operation, including a transfer of counterfeit currency to an undercover agent, Joseph James McGirr, was arrested. Also implicated was a Paul K. Riffle, Jr. McGirr and Riffle were

indicted on October 4, 1966 for counterfeit violations and were due to be tried on May 15, 1967. On the eve of trial McGirr and Riffle indicated a willingness to cooperate with the authorities and later gave detailed statements implicating petitioner and others. These led to the indictment against petitioner in June of 1967. Petitioner had not been arrested at the time of the execution of the search warrant on June 3, 1966.

During the course of the trial both McGirr and Riffle testified concerning an A. B. Dick Model 350 offset press on petitioner's business premises. (Trial Transcript. 39, 142-149).

REASONS FOR GRANTING THE WRIT

I.

The Sufficiency of the Affidavit

Petitioner contends that the writ should be granted to determine whether the affidavit in support of the search warrant was sufficient to support its issuance in view of this Court's decisions in *Spinelli v. United States,* ___ U.S. ___, decided January 27, 1969, *Aguilar v. Texas,* 378 U.S. 108, *Giordenello v. United States,* 357 U.S. 480; and *Nathanson v. United States,* 290 U.S. 41.

The affidavit asserts that certain events took place on April 6, 1966 and April 18, 1966, to wit the purchase and delivery of a printing press. The affidavit does not state where this information came from nor how the affiant came to know it. Further, the assertions that McGirr transferred certain counterfeit notes to an undercover agent does not contain the source of that information, whether affiant received same from the undercover agent or whether he was in some way an observer to the transaction.

The affidavit further asserts that "investigation" disclosed that McGirr requested the Municipal Auto Sales (petitioner's place of business), but the details of that investigation, the sources of the information and their reliability is nowhere detailed in the affidavit.

The final paragraph of the affidavit purports personal knowledge of the affiant. All that it states, however, that a printing press, A. B. Dick Model 350, was observed on the premises. There is nothing to corroborate that it was the same press alleged to have been purchased by and delivered to McGirr. There is nothing in the affidavit to connect the press purchased by McGirr to have been utilized in the printing of counterfeit notes and nothing to connect the press observed on petitioner's business premises with a counterfeit operation.

On its face, the affidavit fails to establish probable cause that the printing press seen on petitioner's business premises was the instrumentality of a crime.

The affidavit clearly fails to meet the standards laid down in *Spinelli v. United States, supra,* and does not meet those in *United States v. Ventresca,* 380 U.S. 102.

In view of what has been discussed above, petitioner contends that the writ should be granted to consider whether or not sufficient underlying circumstances as to reliability were detailed in the affidavit to survive the criteria enunciated in *Aguilar v. Texas, supra,* and whether the affidavit, as a whole, contained sufficient facts, including personal knowledge which corroborated other assertions, to survive the criteria for sufficiency enunciated in *Spinelli v. United States, supra,* and *United States v. Ventresca, supra.*

II.

The Testimony of the Press

Although the Government prevailed on the pre-trial motion to suppress, it did not attempt to introduce into evidence during the course of the trial, the items, including the offset press, seized during the execution of the search warrant on petitioner's business premises on June 3, 1966.

There was testimony concerning the press by co-defendants, McGirr and Riffle, during petitioner's trial in February of 1968. The press had been seized on June 3, 1966. Presumably, it was in the hands of Government agents from

that time. Also, in May of 1967, statements had been obtained from McGirr and Riffle.

Petitioner contends that the writ should be granted to consider the question as to whether the Government should have been permitted to adduce testimony concerning a printing press and its use on petitioner's premises, even though, as petitioner contends, the physical evidence was come about through the execution of a legally insufficient search warrant supported by a defective affidavit.

It is conceded that no testimony concerning the seizure of the printing press was elicited before the jury at trial. It is also conceded that the identities of McGirr and Riffle were not learned as a result of the seizure on June 3, 1966.

However, when McGirr and Riffle testified at the trial of petitioner in February of 1968, they had previously given statements to the Government at a time subsequent to the seizure of the press and related printing articles from petitioner's business premises in June of 1966. The question arises is whether McGirr and Riffle were induced to cooperate with the Government as a result of what had been seized on petitioner's business premises and whether, assuming that the search and seizure of June 3, 1966 was illegal because of what has been advanced above, McGirr and Riffle's trial testimony concerning the press on petitioner's business premises was so connected with the alleged illegal search and seizure as to be a "fruit of the poisonous tree" and thereby bore the taint of the alleged illegality of the search and seizure. This issue was never explored at trial and could not have been explored at trial, because of the ruling on the pre-trial motion to suppress which sustained the search and seizure of June 3, 1966.

It is evident from the record that the Government's failure to introduce at trial the physical evidence seized on June 3, 1966 or any testimony concerning the search and seizure was as a result of a deliberate and calculated choice. Instead the Government relied primarily on McGirr and

Riffle to establish that a printing press was in fact on petitioner's premises.

Petitioner contends that the writ should be granted to determine whether, assuming the illegality of the search and seizure because of an invalid search warrant supported by an insufficient affidavit, derivative use was made at the trial of illegally seized evidence.

As this Court stated in *Silverthorne Lumber Company, Inc. v. United States*, 251 U.S. 385:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

Further in *Nardone v. United States*, 308 U.S. 338:

> ". . . the knowledge [of facts] gained by the government's own wrong cannot be used by it simply because it is used derivatively."

Petitioner submits that language used by Circuit Judge Wright of the United States Court of Appeals for the District of Columbia Circuit in *Killough v. United States*, 315 F.2d 241 at page 252 is in point here:

> "In determining whether evidence sought to be introduced is the fruit of governmental wrongdoing we do not simply count the persons interposed. If that were the test it would be an easy matter to circumvent the Silverthorne-Nardone exclusionary rule by importing illegally obtained information to a series of 'neutral' third persons, the last one of whom could then testify. The extent of the connection must be judged by the strength of the links in the chain, not their number."

As was further stated in *Presley v. Pepersack*, 228 F. Supp. 95, 104:

> "Not only does the Mapp doctrine apply to admissibility of the physical articles seized, but its terms . . . it has application as to any testimony concerning them."

This Court, recently, in *Harrison v. United States,* ___ U.S. ___, reversed a conviction wherein testimony given by Harrison at a prior trial was read to the jury. The prior conviction had been reversed by the court of appeals because of the illegality of confessions. Harrison testified at the prior trial after the confessions had been introduced. This Court held that his testimony had been compelled by the use of the confessions employing the "fruit of the poisonous tree" doctrine. Note: *Wong Sun v. United States,* 371 U.S. 471.

In the instant case, petitioner testified and testimony concerning the press on his business premises appears throughout. (Trial Transcript 281, 284, 285, 287, 288, 322, 323, 325, 347, 348, 349).

It was never brought out during the trial whether petitioner's testimony was impelled by the testimony of McGirr and Riffle about the press, but this is understandable in view of the ruling on the pre-trial motion to suppress. However, if the affidavit in support of the search warrant was insufficient, then the issue of derivative use becomes a prime issue.

It is true, as *Silverthorne, supra,* indicates that knowledge gained from an independent source may be proved (dissenting opinion of Justice White in *Harrison v. United States, supra*). But the sequence of events in this case raises substantial question as to whether the seizure of the press on June 3, 1966, the statements of McGirr and Riffle to the authorities in May of 1967 and their trial testimony in February of 1968, formed a chain of events stemming from the primary illegality.

Further, if this were true, then it must be demonstrated that petitioner's testimony at the trial concerning the press on his business premises was induced by considerations other than the derivative use of unlawfully seized evidence, *Harrison v. United States, supra* (opinion of Justice Stewart). Note: *Fahy v. Connecticut,* 375 U.S. 85.

The writ should be granted to determine whether a new trial should be ordered or whether a remand to the District Court is required to determine whether or not derivative use of illegally seized evidence was adduced at the trial, and whether these considerations impelled petitioner to testify concerning the press on his business premises.

CONCLUSION

For the foregoing reasons, the Petition for the Writ should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,318

[Filed: Feb. 6, 1969]

UNITED STATES OF AMERICA,
Appellee,

v.

LEONARD SIMMONS FENTRESS,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE
Alexander Harvey, II, District Judge

(Argued February 3, 1969. Decided February 6, 1969.)

Before Haynsworth, Chief Judge, and Sobeloff and Craven, Circuit Judges.

Samuel W. Phillips
Clerk

PER CURIAM:

Upon careful consideration of the briefs and oral argument of counsel, we find no error in the conviction.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12, 318

[Filed: Mar. 4, 1969]

UNITED STATES OF AMERICA,
Appellee,

v.

LEONARD SIMMONS FENTRESS,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

Upon consideration of the Petition for Rehearing and, since the fruits of the search were not offered in evidence, being of the opinion that a different result is not required either by *Spinelli v. United States* or by *Harrison v. United States,*

It is now ordered that the Petition be, and it hereby is, denied.

Chief Judge, Fourth Circuit

United States Circuit Judge

United States Circuit Judge

Samuel W. Phillips
Clerk

APPENDIX C

AFFIDAVIT

On April 6, 1966, at Bowie, Maryland, a person identified as Joseph James McGirr ordered a used A. B. Dick Model 350 Offset Printing Press, Serial No. 12010 from Mr. Brian E. Dee, a salesman for the Davidson Manufacturing Corp., 3017 Wilson Blvd., Arlington, Virginia.

On April 18, 1966 the same individual identified by Mr. Dee called at the Davidson Manufacturing Corp. and took delivery of said printing press

On the evening of June 2, 1966, at Baltimore, Maryland, Joseph James McGirr told Leonard Vecchione, an agent of the United States Secret Service, that he had mnaufactured twenty dollar bills and on this same date delivered to Leonard Vecchione one thousand counterfeit twenty dollar federal reserve notes.

Investigation discloses that Joseph James McGirr frequented Municipal Auto Sales and Municipal Inspection Station, 6307 and 6309 Marlboro Pike, District Heights, Maryland.

Your affiant at approximately 3:00 P.M. on June 3, 1966, on pretext was on the public portion of the premises known as Municipal Inspection Station, 6307 and 6309 Marlboro Pike, District Heights, Maryland, and observed through an open door in the inspection station an A. B. Dick Model 350 Offset Printing Press and a one pound can of A. B. Dick Green Offset Printing Ink. (Emphasis supplied.)

/s/ Kenneth Thompson, Special Agent
United States Secret Service